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No. 89-703

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TOMMY EWING,
Petitioner,

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT

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QUESTION PRESENTED

THE STATE INTERMEDIATE APPELLATE COURT EXPRESSLY FOLLOWED *ROGERS VS. MISSOURI PAC. R. CO.* (1957) 352 U.S. 500 IN AFFIRMING THE STATE TRIAL COURT'S JUDICIAL APPRAISAL OF THE EVIDENCE.

Whether this court should exercise its discretionary jurisdiction to review evidence and discuss specific facts where the findings of fact made by the State Trial Court receive the concurrence of the State Intermediate Court of Appeals.

PARTIES BELOW

The parent company of the Respondent, St. Louis Southwestern Railway Co., is the Southern Pacific Transportation Company.

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STATEMENT OF THE CASE

Petitioner, Tommy Ewing, was employed as a travelling mechanic for the Respondent, St. Louis Southwestern Railway Company. The Petitioner's duties as a travelling mechanic involved repairing equipment in the field. On the date of his injury, Petitioner was to replace a clutch on a gang truck located on a parking lot which was surfaced with ballast. Replacing a clutch on a gang truck was a usual part of Petitioner's job and he had performed that task on prior occasions on less than ideal surfaces similar to the parking lot involved here.

The Petitioner furnished his own tools and equipment to do the work. He was supplied with a truck having a boom. In order to perform the repairs on the date of the incident, the

Petitioner first had to remove the transmission to get to the clutch. He used the boom on his truck to remove the transmission and replace the clutch, all without incident. Then, he went underneath the truck to spot the transmission. This portion of the job was also performed without incident.

After the transmission was spotted, the Petitioner began tightening the bolts which secured the transmission to the bellhousing. There was only room enough for one person underneath the truck to tighten the bolts. The Petitioner was lying underneath the truck on a piece of cardboard which he had brought with him. While tightening the last bolt, Petitioner's wrench slipped causing his left elbow to strike the ground. At the time the wrench slipped, Petitioner was pulling on it with his back raised off the ground to obtain the torque he desired. The Petitioner would have been in that same position tightening the bolt in the same manner regardless of whether he had the use of a transmission jack, a concrete floor, additional help or a creeper beforehand. (A-5)

Petitioner testified that he did not have any problems with his back up until the time the wrench slipped. Minutes after the wrench slipped, he began experiencing pain in his lower back and legs while still underneath the truck. The medical testimony at trial established that Petitioner suffered his back and elbow injuries at the same time or after the wrench slipped. Petitioner, an experienced mechanic, did not know why the wrench slipped.

Following a jury verdict in favor of the Petitioner, the trial court entered judgment notwithstanding the verdict in favor of the Respondent which was affirmed on appeal by the Eastern District, Missouri Court of Appeals by unanimous decision. In its opinion, the Court of Appeals held that assuming *arguendo* that Respondent was negligent in not bringing the truck to the Pine Bluff shop 100 miles away to make the repair, not requiring the work to be performed on a rocky parking lot, not providing additional help or a transmission jack, there was still no

causative link, even in the slightest, to the injuries Petitioner sustained. (A-4) The reason for his holding was that at the time the wrench slipped, none of those items would have made any difference. (A-5) Petitioner would have been in the same position at that time doing the same thing as he would have been in the shop where those items were available. (A-5)

SUMMARY OF ARGUMENT

1. The opinion of the State Intermediate Appellate Court does not conflict with any decision of this Court under the Federal Employer's Liability Act. Rather, the State Intermediate Appellate Court expressly followed *Rogers vs. Missouri Pac. R. Co.* (1957) 352 U.S. 500 in affirming the State Trial Court's judicial appraisal of the evidence.

2. The decision below consists solely of a judicial appraisal of the proofs presented at trial. This court must not grant certiorari merely to review evidence that has already been reviewed by two lower courts and found by unanimous decision to be insufficient to support a jury verdict.

ARGUMENT

I. THE STATE INTERMEDIATE APPELLATE COURT EXPRESSLY FOLLOWED *ROGERS VS. MISSOURI PAC. R. CO.* (1957) 352 U.S. 500 IN AFFIRMING THE STATE TRIAL COURT'S JUDICIAL APPRAISAL OF THE EVIDENCE.

The Petitioner exaggerates the import of the Eastern District, Missouri Court of Appeals' holding in this case. Contrary to Petitioner's assertion, the Court of Appeals did not place the burden on him to exclude all other possible causes of his injuries besides the Respondent's negligence. Rather, it merely held that the Petitioner did not sustain his burden of proof that *some* negligence on the part of Respondent contributed even in the slightest, to the injuries complained of. In so holding, the Court of Appeals expressly cited and enforced the governing rules setting forth the scope of appellate review in Federal Employer's Liability Act (45 U.S.C. Sec. 51) cases as laid down by this court in *Rogers vs. Missouri Pacific Railroad Co.* (1957) 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 as follows:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer's negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is present is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death." (352 U.S. at 506-507; 77 S.Ct. 443, 1 L.Ed.2d at 499-500) (A-3)

II. WHETHER THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW EVIDENCE AND DISCUSS SPECIFIC FACTS WHERE THE FINDINGS OF FACT MADE BY THE STATE TRIAL COURT RECEIVE THE CONCURRENCE OF THE STATE INTERMEDIATE COURT OF APPEALS.

The facts and reasons for the Court of Appeals affirmance of the judgment notwithstanding the verdict are fully and accurately set forth in the opinion of the court: The evidence did not establish any cause for the two injuries Petitioner sustained other than the wrench slipping. (A-5) Moreover, the evidence failed to establish any reason why the wrench slipped in the first place. (A-2, 5) Because of the woeful lack of evidence as to the cause of the wrench slipping, the Petitioner allowed the jury to engage in the wildest of speculation by introducing testimony concerning the absence of a creeper, a transmission jack or a concrete floor such as were available in the Pine Bluff shop with which to do his work. (A-5) However, the Petitioner did not sustain his burden of proof that the failure to furnish any of those items was causally connected, even in the slightest, with his claimed accident. (A-4) Even under the Federal Employer's Liability Act, mere speculation cannot supply the place of probative facts. *Tennant vs. Peoria and Pekin Union Ry. Co.* (1943) 321 U.S. 29, 32-33; 64 S.Ct. 409; 88 L.Ed. 520, 524.

At the time of the accident, Petitioner was performing a very ordinary function of his job as a travelling mechanic in placing a wrench on the head of a bolt and tightening it. (A-2) The slipping of the wrench was not attributed to the conditions under which Petitioner was working nor to the failure to furnish any particular piece of equipment or additional help. (A-5) The evidence was undisputed that Petitioner would have been in the same position on his back underneath the truck tightening the bolt in the same manner regardless of whether he was in the shop or out in the field. (A-5)

The portions from the opinion below cited in support of the Petition for Writ of Certiorari relate solely to the fact that Petitioner suffered an injury in the course of his work as a mechanic. Employer negligence under the FELA, however, is not presumed merely by proving an injury. *Nivens vs. St. Louis Southwestern Ry. Co.* (5th Cir. 1970) 425 F.2d 114, 118, *Cert. Den.*, 400 U.S. 879; 91 S.Ct. 121; 27 L.Ed.2d 116. The Act does not make the employer an insurer against injuries suffered by its employees. *Inman v. Baltimore and Ohio R. Co.* (1959) 361 U.S. 138 140; 80 S.Ct. 242; 4 L.Ed.2d 198, 201.

The Petitioner is correct that there are numerous cases decided by this Court stating that the standard under the FELA is liberal in favor of submission of the issues to the jury. Nonetheless, other opinions of the court clearly indicate that there must still be a judicial appraisal as to the sufficiency of evidence to support a jury verdict. See, e.g., *Inman vs. Baltimore and Ohio R. Co., supra; Herdman vs. Pennsylvania R. Co.* (1957) 352 U.S. 518, 77 S.Ct. 455, 1 L.Ed.2d 508; *N.Y., N.H. and Hartford R. Co. vs. Henagan* (1960) 364 U.S. 441; 81 S.Ct. 198; 5 L.Ed.2d 183. In the instant case, the Court of Appeals did not substitute its own inferences from the evidence for those of the jury nor did it apply its own conception of the causation requirement as suggested by the Petitioner. Rather, after judicial appraisal of the proofs, it determined that there was simply no evidence to provide a rational basis for the jury to conclude that any negligence of the Respondent contributed, in the slightest, to Petitioner's injuries. (A-4, 5-6) This Court must not waste its resources by reviewing evidence that has already been reviewed by two lower courts and found by unanimous decision to be insufficient to support a jury verdict. See e.g., *United States vs. Johnson,* 268 U.S. 220, 227 (1925); *Graver Mfg. Co. vs. Linde Co.,* 336 U.S. 271, 275 (1949).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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APPENDIX

APPENDIX A

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

DIVISION FOUR

Nos. 54484 and 54485

Tommy Ewing,
(Plaintiff)Appellant/Cross-Respondent,

v.

St. Louis Southwestern Railway Company, a corporation,
(Defendant)Respondent/Cross-Appellant.

Appeal from the Circuit Court of the City of St. Louis

Hon. Michael Godfrey, Judge

OPINION FILED: May 2, 1989

This case reaches us on consolidated appeals by both parties. Plaintiff appeals from the trial court order granting defendant's motion for judgment notwithstanding the verdict and alternatively conditionally granting a new trial on the basis that the verdict was excessive. Defendant appeals from the trial court's failure to grant a new trial on additional grounds. We affirm the trial court's order granting judgment notwithstanding the verdict.

The action was brought under the Federal Employers' Liability Act (FELA). Plaintiff is a traveling mechanic for defendant employed in Arkansas. His job encompasses servicing equipment of the defendant in the field. He is supplied with a truck having a boom and he furnishes his own tools. On the date of his injury he was dispatched to replace a clutch in a company gang truck. The truck was located on a parking lot next to defendant's depot and the parking lot was part of the railroad's property. The parking lot was surfaced with ballast giving it a

rocky surface. Plaintiff utilized cardboard to protect himself from the rocky surface, but rocks would still make it uncomfortable for plaintiff when he was lying on the ground under the truck. Replacing a clutch on a truck is a usual part of the job of a traveling mechanic and plaintiff had performed that task on prior occasions. It is also not unusual for such repairs to be made on less than ideal surfaces similar to that involved here.

When plaintiff arrived at the scene, he attempted to locate members of the right-of-way maintenance gang to assist him but the gang was apparently out of range of plaintiff's radio. Plaintiff proceeded to do the job by himself. The job is one frequently performed by a single mechanic but some mechanics prefer having a helper. That determination is up to the mechanic. In order to perform the repair it is necessary to remove the transmission of the truck in order to reach the clutch. Plaintiff used the boom to remove the transmission and replaced the clutch, all without incident. It was then necessary for him to replace the transmission and bolt it into position. To replace the transmission plaintiff had to physically push it into position while lying on the ground under the truck. This he also accomplished without any indication of injury. Plaintiff replaced the bolts and as he was aggressively tightening the final bolt his wrench slipped causing his left elbow to strike the ground forcefully. He felt immediate severe pain in his elbow and shortly thereafter, while still under the truck, began to experience pain in his lower back and legs. He completed the job and then returned to his home base and reported the incident. He did not know what caused the wrench to slip but wrenches do from time to time slip for various reasons while being utilized by experienced mechanics such as plaintiff.

Plaintiff obtained medical treatment for his elbow and back. He had broken his elbow several years earlier and the major treatment to the elbow was to repair damage from that prior break which treatment would have been necessary eventually regardless of the injury incurred while changing the clutch.

Medical testimony established that he has a bulging disc in his lower back which his medical experts attributed to the accident. His experts were unable to make a prognosis of the level of difficulty he might experience in the future from the bulging disc other than that he would on occasions have pain. He lost $12,000 in wages from the accident. There was no evidence of any other special damages. He is presently employed in the same job. He has sufficient seniority that if he desired to work as a mechanic in defendant's shop in Pine Bluff he could do so, but for personal reasons he prefers to continue as a traveling mechanic. The jury assessed plaintiff's damages at $512,000 and attributed 30% of the fault to plaintiff for a total award to plaintiff of $358,400.

In *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S.Ct. 443 (1957) the Supreme Court set forth the scope of appellate review in FELA cases as follows:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death." 77 S.Ct. 443 at [6-8].

Nevertheless, an employee's case, to be submissible under FELA must include all the same elements as are found in a common-law negligence action. *Davis v. Burlington Northern, Inc.*, 541 F.2d 182 (8th Cir. 1976) [1-3]. That includes causation although, as *Rogers* indicates, in FELA the causation require-

ment is modified so that if the railroad's negligence is the slightest cause of the injury liability is established. There must therefore be evidence to connect the injury to some negligent conduct of the defendant.

Plaintiff contends here that the railroad failed to provide plaintiff with a safe place to work and a reasonably safe method to do the work. He hypothesizes several possibilities of things the defendant could and should have done to make the job safer, i.e., bring the truck to the Pine Bluff shop 100 miles away to make the repair, not require the work to be performed on a rocky parking lot, provide additional help in doing the work, provide a transmission jack to spot the transmission. If for purposes of this case we assume *arguendo* that any or all of these items demonstrate negligence we are still left with no causative link, even the slightest, to the injury plaintiff sustained.

Plaintiff testified that he had no problems with his back until after the wrench slipped. There was no medical testimony that the back injury had its origin prior to the wrench slipping. The elbow injury clearly occurred solely because the wrench slipped. In the history given to one doctor plaintiff stated that "he was working under a truck when a wrench slipped and he struck his left elbow against the ground. He was changing the transmission in a truck, and working in an awkward position and lifting. He believes he injured his back at the same time." The doctor testified that "*that activity* as he provided the history of" could have aggravated the normal degenerative changes in plaintiff's back. Which activity the doctor was referring to was not established nor did the doctor state that plaintiff's back condition was in fact caused by any activity prior to the wrench incident. At the time the wrench slipped, plaintiff was not lifting the transmission, he was pulling on the wrench with his back raised from the ground in order to obtain the torque he desired. A second doctor was given a hypothetical question "whether or not these conditions were caused by the incident when he was working under the transmission when he was pushing against

the transmission and when he was pulling on the wrench and his elbow slipped ... ." The doctor responded "that the incident that I described to you when he was under the truck did cause the muscle damage, the ligament damage, the nerve damage, and the bulging disk. It also caused the elbow problem, but again that's not what I'm treating." The incident which admittedly caused the elbow injury was the wrench slipping. The doctor did state later that lying in an awkward position and pushing a transmission can cause a herniated disk and muscle damage depending on the exertion involved. He did not testify that such activity caused plaintiff's back problems. Assurance of possibilities of causation is not, of itself, sufficient to make a submissible case upon the issue of cause and effect. *Kimmie v. Terminal R.R. Ass'n. of St. Louis,* 334 Mo. 596, 66 S.W.2d 561 (1933) [9-11].

The evidence did not establish any cause for the two injuries plaintiff sustained other than the wrench slipping. All of plaintiff's pain followed that occurrence, none preceded it.

Plaintiff did not know what caused the wrench to slip. He did give several possibilities, none of them involving negligence by the railroad. He did not attribute the slipping of the wrench to the position he was in, to the condition of the parking lot, or to the conditions under which he was working. The tightening of the bolts was in a space where only one person could work so additional help would not have affected the accident. He testified that the transmission was already placed and secured when the wrench slipped so a jack would have made no difference. He also testified that he would have been in the same position doing the same thing in the shop. It is the height of speculation to conclude that being in the shop would have made any difference.

Plaintiff suffered a job-related accident. Congress has chosen to impose liability for such accidents against the employer only when the injury is the result of some negligence

on the employer's part. It has not chosen to utilize the approach taken by the states under Workers' compensation statutes. *Rogers, supra.* 77 S.Ct. [11-16]. Plaintiff did not establish that his injury was the result of any negligence on defendant's part. The trial court correctly entered judgment notwithstanding the verdict. In view of this finding it is unnecessary for us to address the other issues raised.

Judgment affirmed.

/s/ Gerald M. Smith,
Presiding Judge

Stephan, J; Satz, J.; Concur